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In the

[illegible] Court of the United States

October Term, A. D. 1957

[illegible] UNITED STATES OF AMERICA,

Petitioner,

v.

[illegible] RALPH BAKER,

Respondent.

[illegible] UNITED STATES OF AMERICA,

Petitioner,

v.

[illegible] ORRIN DOYLE,

Respondent.

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

Nos. 146, 147

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

RALPH RAYNOR,
Respondent.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

CHETT FOWLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 105-111 and 117-122) is reported in 89 F. (2d) 469. The charge of the trial court appears in the record, pages 72-80.

QUESTION PRESENTED.

The question presented is stated more clearly and satisfactorily by the majority opinion of the Circuit Court of Appeals (R. 107) than by the brief of the petitioner. The Court of Appeals' majority said:

> "Appellants contend that the paper, the possession of which is prohibited by the statute, is paper similar to the distinctive paper adopted by the Secretary of the Treasury and adapted to the making of genuine government obligations and securities. The District Attorney contends that the paper contemplated by the statute is paper, which if printed as a counterfeit obligation, would pass as currency in the general trade of the United States. Appellants assert that the test is not whether it would pass as currency in the general trade of the country, but whether it is in fact adapted to the making of valid government obligations."

STATEMENT.

The government petition speaks as if the defendants were counterfeiters engaged in counterfeiting. Such is not the fact. The respondents, Raynor and Fowler, were not counterfeiters and it was expressly understood and agreed between them that no counterfeiting would be done. (R. 13, 14, 18, 19.) The negotiations culminating in the scheme proved against respondents, were initiated by a government informer, Cones, who had himself been convicted of counterfeiting in 1931 and after serving part of his sentence was paroled and became an informer for the government, receiving compensation for each case. (R. 18.) In 1935 Cones tried unsuccessfully to implicate Fowler in illegal narcotic transactions. (R. 17, 18.) Finally Cones testified that he and Fowler agreed on a plan in substance as follows: Cones told Fowler that Cones would procure a victim with a large amount of ready cash such as $10,000 and Fowler agreed to produce a man who would pretend to but would not actually counterfeit money, and the victim would be swindled of his money by securing possession of his $10,000 and running off with it. (R. 14.)

The statement in the government petition dwells at length upon alleged dissimilarities between Government Exhibit 28 (the government paper) and Government Exhibit 3 (the paper found in defendant's possession). The government's statement omits the testimony of the witness Keller that Government Exhibit 3 was not as heavy a quality as Government Exhibit 28 (R. 64); of witness Paramore that the two papers were not similar so far as the formation of the paper is concerned (R. 68); of witness Hargitt that the two papers are not the same shade

of white and that the government paper is harder and has more sizing or glue on it; and of witness Newcomb that the government paper formation is a little "wilder" than that of Government Exhibit 3. (R. 71.)

The government petition states that: "The position of the government is that the paper contemplated by the statute need not be genuine government paper but rather paper which the average individual would believe to be the distinctive, genuine paper adopted by the government." We submit that this position of the government is erroneous as it gives effect only to the word similar in the statute, and gives no meaning to "adapted to the making of each (genuine) obligation." It also fails to account for the requirement of permission from the Secretary of the Treasury.

The theory of the government at the trial was not that Government Exhibit 3 would be mistaken by the average person for Government Exhibit 28, but the jury were asked to decide that if Government Exhibit 3 should be printed as money by the government (that is, with the highest degree of skill, with genuine government inks and on the genuine government presses and dies) the resulting counterfeit product would pass currency among average persons. (R. 54.) This involved a hypothesis contrary to fact as Mr. Gallagher, the secret service agent, testified (R. 51) that: "the government does not use any paper for printing its currency and bonds unless the paper has silk threads in it." Mr. Burton, the government employee from the Treasury Department, testified also that the government did not and would not "use any paper like that, Government Exhibit 3, for printing government obligations." (R. 56.)

Therefore the prosecution at the trial in eliciting this testimony from the witnesses required them to answer a

hypothetical question based upon an impossibility, namely, if Government Exhibit 3 (which under the law cannot be printed as money by the Department of Printing and Engraving or indeed by anyone) were to be printed as money by the Treasury Department (thereby becoming counterfeit money), whether such counterfeit money would pass currency in the general trade of the country, that is, deceive the trade into the belief that it was genuine money.

Incidentally there is no evidence that the jury would know what Government Exhibit 3 would look like if printed upon with money presses, etc. The prosecution and trial court evidently assumed that the jury could guess as to the appearance of such an imaginary and non-existent article.

ARGUMENT.

The government petition in paragraph 1 of its specification of errors does not clearly set forth the Circuit Court of Appeals' holding. That holding is best expressed by the court itself in the following succinct statement (R. 109): "Paper of the kind possessed by the defendants is in common use—it is on sale by every dealer and is possessed by thousands of citizens. Paper of the kind used by the government in printing currency is of a distinctive type in that it has impregnated red and blue silk fibers, a feature not present in commercial paper. It is not for sale by any merchant and cannot lawfully be purchased or possessed except by authority of the Secretary of the Treasurer or other proper officer. It is faithfully guarded by the government from the moment of its manufacture until it is released for circulation as government obligations. Obviously it was the possession of paper, thus suitable for and adapted to the making of the genuine obligations that Congress was outlawing. It is freely conceded that the paper in question contained no such fibers. That someone had caused red and blue pencil marks to be placed upon the paper in an effort to simulate the genuine is immaterial so far as the offense charged in the second count of the indictment is concerned. It does not require an expert to observe at a single glance that such markings are not red and blue silk fibers."

Notwithstanding the fact that two Circuit Courts of Appeals have rendered opinions against the government contention, the government petition assumes that there is a necessity for construction of the statute. Government counsel seem to avoid reference to the words of the statute and in effect contend that any paper generally

similar in appearance, although not similar in construction or formation, and although not adapted for printing government obligations, is outlawed by the statute.

No explanation is given by the government petition of the words of the statute "adapted to the making of such obligations and other securities." It cannot be successfully disputed that, as held by the Court of Appeals, the only kind of paper "adapted" for making government obligations and securities is paper which has red and blue silk threads impregnated or woven in the body of the paper. Neither can it be successfully denied that, as held by the Court of Appeals in the instant case and by the Court of Appeals in the Second Circuit in the case of *Krakowski* v. *United States*, 161 F. 88, "such" obligations in the statute are genuine and not counterfeit obligations. The failure of government counsel to discuss these vital and indispensable words, are, we respectfully submit, an admission that the holding of the Circuit Court of Appeals here is correct.

Government counsel's principal argument seems based not on the words of the statute itself but on an inference drawn from the statement of a Special Joint Congressional Committee that the law is broadened to embrace every method of counterfeiting. This statement is not at all inconsistent with the holdings in the Krakowski case (161 Fed. 88) and the present case, 89 F. (2d) 469, which protect the genuine government paper adopted by the Treasury, and similar paper adapted for printing government obligations, from possible use in counterfeiting, by prohibiting the unauthorized possession of such paper.

It is plain that the present statute is broader than the Act of 1837 from which it is derived, in that the latter required proof of an intent to counterfeit.

Therefore the assumption in the government petition

that the Courts of Appeals held that Congress intended to relax its fight against counterfeiters, is not only illogical and unfounded, but not just to those Courts.

The statutes set forth in the government petition clearly indicate that Congress at all times intended to limit the prohibited paper, by specific description, as held in the two decisions of the Courts of Appeals on which we rely. Otherwise, as said by the Court of Appeals here (R. 108) every manufacturer, merchant or printer making, using or dealing in better grade bond paper, would have to have permission from the Secretary of the Treasury to lawfully possess such paper.

We respectfully disagree with the statement of government counsel that the Court of Appeals here felt that a conviction would have been warranted upon the first count of the indictment, on which a verdict of not guilty was returned by direction of the trial court. Even were such the fact, that would not affect the construction of the clause of the statute here involved, in order to confer Federal jurisdiction of what is essentially a State matter.

We realize that respondents are subject to severe censure for yielding to the persuasions of the informer Cones and agreeing to swindle a supposed victim who was really a decoy selected by Cones, but the offense, if a crime, clearly seems within State jurisdiction. The culpability of the parties clearly cannot affect the construction of the law.

The contention in the present government brief that the Krakowski decision (161 F. 88) is erroneous, comes rather late inasmuch as that decision was rendered approximately twenty-eight (28) years ago and apparently no effort was made by the government at the time of the rendition of that decision or since, up to the present time, to overcome the effects of that decision.

The Krakowski decision was rendered in 1908. It has stood since that time to the present, not only without disapproval, but also without adverse comment thereon by any Federal court. It appears evident, therefore, that the Krakowski case has been accepted as embodying the correct interpretation of the statute for a period of some twenty-eight years, both by the Treasury Department and the Department of Justice of the United States. Had the officials of either of these departments felt that the Krakowski decision were incorrect it cannot be doubted that other prosecutions based upon the construction of the statute which was disapproved in that case, and which is the basis of the conviction in the present case, would have been instituted and have resulted in decisions by the Federal Court of Appeals, and probably the Supreme Court of the United States, in the twenty-eight year period mentioned.

In the case of *The United States* v. *Cerecedo Hermanos Y Compania,* 209 U. S. 337, 28 S. C. 532, the Supreme Court said:

> "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson* v. *Downing,* 127 U. S. 607, 8 S. C. 1328; *U. S.* v. *Healey,* 160 U. S. 136, 16 S. C. 247."

In addition, it is apparent that Congress has approved and acquiesced in the construction set forth in the Krakowski decision. In 1908 this statute was known as Section 5430 of the Revised Statutes. About eighteen months thereafter the statute was re-enacted without change as Section 150 of the Federal Penal Code, in force January 1, 1910. Again, this section was re-enacted, without change, as Section 264 U. S. C. A. in the Code of Laws

of the United States, in force December 7, 1925, as enacted by Congress June 28 and approved June 30, 1926. Certainly, if Congress had felt that the construction of the statute in the Krakowski case (161 Fed. 88), were erroneous, the legislature would have amended the statute either in the codification of 1910 or that of 1925, or at some other time within the twenty-eight year period.

The rule, of course, is that when a statute has been re-enacted it incorporates existing interpretations.

In *Heald* v. *District of Columbia,* 254 U. S. 20, 41 S. C. 42, the Supreme Court, at page 23, said that it was

> "a settled rule that, where provisions of a statute had previously to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary."

To the same effect is *Bruce* v. *Tobin,* 245 N. S. 18, 38 S. C. 7.

In *U. S.* v. *Cerecedo Hermanos Y Compania,* 209 U. S. 337, 28 S. C. 532, it was said:

> "And we have decided that the re-enactment by Congress without change of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction. *U. S.* v. *G. Folk & Bro.,* 204 U. S. 143, 152, 27 S. C. 191."

In *Latimer* v. *U. S.,* 223 U. S. 501, 32 S. C. 242, speaking of the meaning of the words "unmanufactured tobacco" it was said:

> "The words having received such a construction under the Act of 1883 must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute Congress adopted the construction already given it by this Court."

In *Beale* v. *U. S.*, 71 Fed. (2d) 737 (8th C.) the Court, speaking of the fact that no amendments of a statute had been made in a three-year period since a decision of the United States Supreme Court construed the statute, said, at page 739:

> "We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have Congressional sanction and approval."

In view of the fact that the law has twice been construed by two Circuit Courts of Appeals contrary to the contention of the government and that the first of these decisions has stood for a period of some twenty-eight years without adverse comment or criticism by any other court, it seems apparent, we respectfully submit, that the government here seeks to have the Supreme Court do what Congress has declined to do, namely, to make unlawful the possession of any paper which might conceivably be used in the making of counterfeit obligations. The Supreme Court has often refused to assume the functions of a legislative body. *Iselin* v. *U. S.*, 270 U. S. 245; *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643.

CONCLUSION.

In conclusion, we respectfully submit that the questions here urged have been correctly decided by two Circuit Courts of Appeal, that the first of these decisions has stood unquestioned for twenty-eight years, that there is no conflict of decisions, or other reason for the issuance of certiorari. It is therefore respectfully submitted that the petition should be denied.

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